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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT,
v.
THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN G. THOMPSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT, *v.* CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT, *v.* THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

AS TO THE EQUALITY OF ARMY AND NAVY PAY ESTABLISHED BY THE NAVY PERSONNEL ACT.

Counsel for the appellee assume to found the claim which is the basis of this action, upon the proposition that the navy personnel act established equality of pay between the officers of the Army and Navy by providing that the pay of officers of corresponding rank in the Army and Navy should be the same "in the same official circumstances." We assent to this proposition, but insist that the contention of claimant in this appeal involves the destruction of the equality of pay

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thus created, by calling for different pay to the great body of officers of the Army and Navy of the same relative rank "in the same official circumstances," instead of the same pay now received by them. As a result of the provisions of the navy personnel act, the pay of officers in the Navy for the performance of their *ordinary, normal duties*—that is, sea service (see dissenting opinion of Chief Justice Nott in this case, 30 C. Cls. R., 123)—was made the same as the pay of officers of corresponding rank in the Army for *their* normal and customary service. Such normal and customary service of army officers is chiefly service "within the limits of the States comprising the Union and the territories of the United States contiguous thereto." Having thus established equality of pay for service of like character, Congress proceeded in the same act to provide a special compensation for the performance by naval officers of shore duty—a character of service for which there is nothing corresponding in the service of army officers,—the same being fixed at 15 per cent less than their regular normal pay. But, at the same time, there was in the mind of Congress the fact that executive officers of the Navy might be called upon to perform the occasional service of shore duty in connection with ships, and accordingly express provision was made for this contingency by the *further* provision that when naval officers are detailed for shore duty beyond sea they shall received the same pay as that provided by law for officers of the Army detailed for duty in similar places, thus also establishing

equality of pay for service on land beyond seas by officers of either branch of the service. There, then, was established absolute equality of pay for officers of the Army and Navy for all service of a similar character or, to borrow the language of Chief Justice Taney, "in the same official circumstances." (20 U. S. 8 L. 483.)

Thus the effect of the navy personnel act was to adapt for officers of the Navy the pay table of officers of the Army with reference to the performance by each of their customary, normal service, with the additional provision that for the performance of service on land beyond seas they shall also receive the same pay. This equality is, by the terms of the act, to be preserved, so that any subsequent legislation affecting the pay of officers of the Army for their normal or customary service—that is to say, within the ordinary limits of the United States, or for service beyond seas—would equally affect the pay of officers of the Navy for like normal service—that is to say, on service, and for shore duty beyond seas. Applying, then, the statutes of May 28, 1908, and March 3, 1911, increasing the pay of officers in the Army for service of normal character, namely, beyond seas, the pay of officers of the Navy for shore duty in the same localities is, by virtue of the further proviso of the navy personnel act, correspondingly increased. And by thus applying these statutes for increased pay of army officers the equality of pay previously established by the navy personnel act remains undisturbed.

But the claimant, on the other hand, contends for an application of these statutes for increased pay which would essentially destroy this equality; for his contention is that as a result of said statutes the pay of officers of the Navy for the performance of their regular, normal duty—sea service—instead of continuing to be the same as that of officers of the Army for their usual and customary service, service within the United States, not beyond seas, as established by the navy personnel act, is increased 10 per cent over that of such army officers. In other words, the contention of claimant is, in effect, that a statute which increases the pay of army officers only when performing duty beyond seas substantially operates to increase all the pay of officers of the Navy.[a] It remains for counsel for claimant to supplement their argument in support of this extraordinary proposition by explaining how the equality of pay established by the navy personnel act can be said to be preserved by destroying it; and how the *same* pay provided by the navy personnel act for similar normal service, in the Army and Navy can be said to be continued by establishing *different* pay for such service.

In our former brief we pointed out that the inequality thus contended for by claimant is emphasized by the fact that, if his contention be assented to, there would result an increase of the pay of commissioned officers of the line of the Navy and of the Medical and Pay Corps for sea service beyond seas, without any corresponding increase in the pay of the petty offi-

[a] Except for ordinary shore duty.

cers and common sailors of the Navy for exactly similar service. And this, too, although express provision has been made by Congress for a very substantial increase of the pay of enlisted men of the Army for service beyond seas. It seems inconceivable that Congress should have intended to make any such unequal discrimination. Counsel's answer to this phase of our argument is merely that Congress has not assimilated the pay of the body of the Navy and of the enlisted men of the Army. This is true, but inconclusive. The fact remains that every reason which would tend to influence Congress to increase the pay of the higher officers of the Navy for sea service outside the ordinary limits of the United States would operate toward the enactment of a similar provision for the petty officers and ordinary seamen of the Navy for the same service. And since Congress has made no such provision in favor of the great bulk of our Navy, it is certainly a fair inference that the statutes under consideration are not intended to operate as favored legislation for the benefit of a select few, but that the full and equal purpose of these and kindred statutes is accomplished by increasing the pay of officers of the Army, the Navy, and the Marine Corps and of enlisted men of the Army and Marine Corps, for service on land beyond seas; an increase in which the great body of the Navy could obviously not expect to share, since such service is never required of them.

In brief, then, the contention of the Government is that these statutes under consideration provide increased pay for officers of the Army for special service in the island and outlying territory of the United States, and that such increase of pay inures to the benefit of officers of the Navy, by virtue of the *further proviso* of the navy personnel act, for shore duty in the same locality—that is, for similar service or "service under the same official circumstances;" that this increase of pay does not extend to sea service of naval officers, because it is not similar service nor service under like official circumstances; that, in other words, the manifest reason for an increase of pay of officers of the Army and Navy for service on shore beyond seas does not apply at all to the sea service of naval officers, and that therefore the claim of the claimant is based upon services which are not within the reason and purpose of the statutes invoked by him.

But it is urged by counsel for the claimant that the language of the statutes is so clear and unmistakable as to preclude all examination into their reason and purpose; that they provide in clear and unmistakable terms that the pay of officers of the Army and Navy shall be the same for all service performed in the places named, and that there is nothing more to be said upon the subject. This argument combines bad logic with an unwarranted assumption. These statutes for increase of pay relate in terms to the Army only, and they can be applied to officers of the Navy by

mplication only, pursuant to the provisions of the navy personnel act. It is certainly strange logic that rgues that naval officers are entitled by *implication* to he benefits of statutes having no direct reference to hem, without bringing their claim within the reason nd purpose of such statutes. Manifestly such claim hould be shown to be within the reasonable purpose f the statutes or it should be denied.

As for the assertion that the application of these tatutes is determined by place of service solely, it is n assumption founded on a clear perversion of the anguage of the statutes.

Suppose, by way of illustration, that Congress, after he passage of the navy personnel act, had enacted hat the pay of officers of the Army should be in-reased for such part of their service as should be per-formed by them while on board Government vessels, ould it be reasonably urged that such a statute would operate to give the same increase of pay for all ea service performed by officers of the Navy because uch service was performed on Government vessels?

The statute of May 26, 1900, gives the increase of ay to army officers in our island possessions and in he Territory of Alaska, service in China being in-luded in the operation of the act by the proviso of the ct of March 2, 1901; and by the general provisions f this later act officers of the Army are given increase f pay for service beyond the limits of the States omprising the Union and the Territories of the nited States contiguous thereto. But the service

thus provided for is military service, which is service performed on shore. How can sea service of naval officers be construed to be similar service to this or, even adopting the exact language of claimant's contention, "service in the same place?" Certainly service at sea is not performed in the same place as service on land. But circumstances may arise under which naval officers would be called upon to perform service in identically the same places beyond seas as Army officers, and for such service officers of the Navy do receive the benefits of this increase of pay by virtue of the *further proviso* of the navy personnel act, which makes provision in so many words for the same pay for services of officers of the Army and Navy performed in "similar places." Furthermore the record in this case shows that a very considerable portion of the service of the claimant on which this claim is based was performed upon the high seas in various trips between Hongkong and the Philippines, and between Hongkong and Japan and the Philippines and Japan; and surely in no sense can such service be deemed service in either China or the Philippine Islands.

But it seems to us that claimant's attempt to confine the operation of these statutes to an inquiry as to the literal location of the service performed is a perversion of the statutes in every sense. Clearly, it seems to us, these statutes were enacted to give to officers of the Army increased pay for unusual service because of the additional burdens, hazards, and discomforts attendant upon such service, and that there

could have been no legislative intention to give the same increase of pay to officers of the Navy except for services involving similar burdens, hazards, and discomforts, namely, shore duty performed in the localities named in the act of 1900 or, under the provisions of the act of 1901, beyond seas. And in recognition of the fact that these increased burdens and discomforts would naturally begin with the landsman upon the commencement of his voyage to his place of duty and continue on his return therefrom, the statute of 1901 provided that "the time of such service shall be counted from the date of departure from said States to the date of return thereto."

Now, if the contention of claimant is correct, since the passage of the act of March 2, 1901, every naval officer who performs any sea service outside the ordinary boundaries of the United States—that is to say, beyond the 3-mile limits of the United States,—will receive 10 per cent increase of pay for all such service, and that increase will begin on the day that his ship leaves port in the United States and continue until its return to some port of the United States. Can anything be more unreasonable and preposterous than this? But here counsel for claimant, still insisting that no inquiry into the character of the service provided for in these statutes is permissible, proceed to point out, on page 27 of their brief, that as a matter of fact the greater portion of the territory beyond seas in which such service would be performed possesses such a delightfully salubrious climate, and is altogether so attractive and

charming, that service in those localities, instead of being accompanied with extra hazards, discomforts, and burdens, is really a delight. The effect of all of which is that Congress has provided for an increase of pay for service in these outlying possessions of ours not only *apropos* of nothing in the way of extra burdens or hazards or discomforts, but actually because such service is altogether lovely. We nevertheless must insist that Congress passed these statutes for increase of pay with manifest reference to the unusual and onerous character of the service thus provided for. Of course the hazards of warfare, more especially referred to by the Court of Claims in their original opinion in this case, and to which particular reference was made in our former brief, can not properly be said to have been solely contemplated by the later act of 1901, but beyond question Congress had in contemplation at that time all the various conditions tending to make such unusual service more onerous and undesirable than service within the ordinary limits of the United States.

DECISIONS RELIED ON BY CLAIMANT.

We fail to find that the contention of claimant in this case receives support in any of the decisions cited in the brief for the appellee in this case. These decisions unquestionably sustain the proposition that the equality of pay provided for by the navy personnel act and similar prior statutes should be fully and fairly preserved, but in no instance has it heretofore been held

that assimilated pay should prevail for totally dissimilar services, as contended for in this case.

For example: In the case of *Richardson* v. *United States* (38 C. Cls. R., 193), especially cited by counsel, the court held that the navy personnel act, read in connection with section 1168 of the Revised Statutes, which provides "that assistant surgeons shall rank with a lieutenant of cavalry for the first three years of service, and with the rank of captain of cavalry after three years of service," operates to give the claimant mounted pay, for the obvious reason that the officer of the Army of corresponding rank with that of the claimant, being a cavalry officer, was presumed to be mounted.

As for the case of Crosley, also cited for claimant, that decision is based upon the principle for which we contend—that the navy personnel act assimilates Army and Navy pay for "*similar service.*" (38 C. Cls. R., 86.)

That part of the decision of this court in the *Gibson case* (194 U. S., 191–192), upon which counsel for claimant attempt to rely in this case, holds simply that the provision of the navy personnel act that officers of the Navy shall receive the same allowances, except forage, as are or may be provided for officers of corresponding rank in the Army means exactly what it says; and that therefore, under the operation of that provision, Navy officers could not continue to receive the sea ration since Army officers received no such allowance, because if officers of the Navy were to continue to receive the sea ration the result would not be

the *same*, but *different* allowances to the two branches of the service.

Reference is made by counsel to the fact that the accounting officers of the Government have allowed to officers of the Army this increase of pay in several cases where the service performed by them beyond seas was on army transports and on army gunboats in the Philippines. This service is described by counsel as "army sea service," and the inference drawn from these instances is that by the same token officers of the Navy should receive increased pay for their sea service. It is hard to treat this argument seriously. As we have already pointed out, the increase of pay is allowed because of the unusual character of the service for which it is provided. Certainly it can not be said that the unusual character or the burden of service beyond seas, by army officers, is at all lessened because performed on Government vessels, nor that it is any less military service because so performed; and certainly it would seem that there could be no plainer *non sequitur* than the argument that because a military officer is allowed the benefits of the act giving him increased pay for service beyond seas, where that service happens to take the unusual and extraordinary form of performance on a Government vessel, therefore a naval officer should in all instances receive the same increase of pay for the performance of his normal and customary duty on Government vessels.

THE INTENT OF CONGRESS AS SHOWN BY SUBSEQUENT APPROPRIATION ACTS.

In our former brief we referred to the subject of the intent of Congress in these statutes for increased pay as evidenced by subsequent appropriation acts. This portion of our argument we desire to amplify as follows:

The statute of May 26, 1900, which was the first statute granting 10 per cent increase to officers of the Army, did so in a proviso of the appropriation act for the Army for the fiscal year 1901, but did not provide for the payment of such increased pay. The subsequent appropriation statute of March 2, 1901, for the support of the Army for the fiscal year 1902, in which provision was made for increase of pay of officers of the Army serving beyond the continental limits of the United States, appropriated $500,000, "for additional 10 *per centum* increase on pay of officers serving at foreign stations." (31 Stat. L., p. 903.) This is followed by a similar provision in the army appropriation act of June 30, 1902, for the fiscal year 1903, the amount appropriated being $451,456. (32 Stat. L., p. 507.) In the army appropriation act of March 2, 1903, for the fiscal year 1904, $200,000 is appropriated for the same purpose. (32 Stat. L., p. 933.) The army appropriation act of April 23, 1904 (33 Stat. L., p. 259), for the fiscal year 1905, contains the following provision: "For additional 10 per centum increase on the pay of commissioned officers serving in the Philippine Islands,

island of Guam, Alaska, China, and Panama, $167,426.30."

But at no time since the passage of either of these statutes for increased pay has any appropriation been made for the payment of any such increased pay to the officers of the Navy.

It would seem that Congress could have manifested in no more significant and effective manner that these statutes were not intended to give the increased pay to officers of the Navy contended for in this case.

In this connection, see *Dunlap* v. *United States* (173 U. S., p. 75).

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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In The

Supreme Court of the United States

OCTOBER TERM, 19

No. 84-19

THE UNITED STATES, Appellant,

v.

CHARLES R. THOMAS,

CHARLES R. THOMAS, Appellant,

v.

THE UNITED STATES,

Appeals from the United States Court of Claims

Brief for

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, *Appellant*,
v.
THE UNITED STATES. } No. 95.

Appeals from the Court of Claims.

BRIEF FOR CHARLES M. THOMAS,

APPELLEE IN No. 94, APPELLANT IN No. 95.

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I. STATEMENT OF THE CASE.

History of the Case.

The claimant, Charles M. Thomas, a captain in the Navy, filed his petition in the Court of Claims November 29, 1901, and an amended petition January 17, 1902 (Record, pp. 1–5), claiming various items of pay as due him under the provisions of § 13 of "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," Approved March 3, 1899, commonly known as the Navy Personnel Act (30 Stat. L. 1007), and legislation subsequent thereto.

On the first hearing of the case the court gave judgment, January 5, 1903, in favor of the claimant for an item of mileage, $97.42, not in dispute in this court, and disallowed all the remaining claims. The opinion of the court was delivered by Judge Peelle (Record, pp. 10–18). Mr. Chief Justice Nott delivered a dissenting opinion (pp. 19–21).

The claimant moved for a new trial (p. 22). On the hearing of this motion the court reversed its action in the disallowance of several of the claims and gave judgment, June 1, 1903, in favor of the claimant for an increased amount, $568.29. Judge Peelle delivered the opinion of the court (pp. 22–25). The case is reported 38 C. Cls. 113, 719.

The United States appealed from the judgment (foot of page 25) and the claimant took a cross appeal (foot of page 26).

Items Allowed by Court of Claims.

1. Ten Per Cent Increase of Pay.

The Navy Personnel Act of March 3, 1899, § 13 (30 Stat. L. 1007) quoted in full, *post*, page 8, provides that

"commissioned officers of the line of the Navy" "shall receive the same pay and allowances" "as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The Army Appropriation Act of May 26, 1900 (31 Stat. L. 211), quoted in full, *post*, page 9, provides that "the pay proper of all officers" serving "in the Philippine Islands" and in other places named "shall be increased ten per centum" over the rates fixed by law.

The Army Appropriation Act of March 2, 1901 (31 Stat. L. 903), quoted, *post*, page 9, adds China retrospectively from May 26, 1900, to the places named in the act of that date and prospectively provides for the same ten per cent increase of pay to all officers "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

The claimant, a commissioned officer of the line of the Navy, served as commanding officer of vessels cruising in Philippine and Chinese waters co-operating with the Army from May 26, 1900, to March 2, 1901, and in those and other waters "beyond the limits of the States comprising the Union" and contiguous territories from March 2, 1901, to June 12, 1901.

The claim is that by the operation of the Personnel Act of 1899, the claimant as an officer of the Navy is entitled to an increase of ten per cent on his pay for service after May 26, 1900, in the waters of the Philippine Islands or China, and after March 2, 1901, anywhere beyond the limits of the States comprising the Union.

The first decision of the Court of Claims was against this claim (paragraph 3 of opinion, Record, pp. 12, 13). This ruling was reversed on the second hearing and the claim allowed (Opinion, pp. 22–25).

The United States appeal from that part of the judgment allowing this item.

2. Calculation of Increase.

The question how this increase is to be calculated is also involved.

The pay of an officer of the Army and, since the passage of the Personnel Act, of an officer of the Navy likewise, is made up of two elements:

1. The grade or minimum pay under Revised Statutes, § 1261.

2. Increases of pay for length of service under Revised Statutes, § 1262.

The increase granted by the acts of May 26, 1900, and March 2, 1901, is of "pay proper."

The Government claims that pay proper is confined to the grade or minimum pay under § 1261, while the claimant insists that it also includes the increase for length of service under § 1262.

The Court of Claims decides on this point in favor of the claimant. (Opinion, near foot of p. 24.) The appeal of the Government challenges the correctness of this ruling.

Item Rejected by Court of Claims.

Full Pay While Traveling Between Vessels.

The claimant was detached from the *Lancaster* at Barbados, December 2, 1899, and reported on the *Baltimore* at Hongkong, February 7, 1900. Between these dates he was occupied in traveling on duty, partly on merchant steamers and partly on land, and in reporting at the Navy Department. He also traveled by merchant steamer from Cavite to Hongkong on April 5 and 6, 1901, in changing commands. For both these periods his pay has been reduced fifteen per centum in accordance with the first proviso to § 13 of the Personnel Act as "when on shore." He claims the full pay of an army officer.

The Court of Claims disallowed this claim. It forms the sole subject of the cross appeal of the claimant.

Items Not in Dispute.

Besides the above items now before this court for decision, two other items appear in the petition.

The first is for mileage. This was allowed by the Court of Claims, and no error is assigned on this allowance by the United States.

The second is for the navy ration while at sea. It was disallowed by the Court of Claims. This disallowance is in effect sustained by the decision in *Gibson* v. *United States* (194 U. S. 182, 191, 192), and no error is assigned thereon by the claimant.

II. ASSIGNMENT OF ERROR.

The claimant, Charles M. Thomas, appellant in No. 95, hereby assigns the following error in the judgment of the Court of Claims:

That said court held that the claimant, Charles M. Thomas, as captain in the Navy, was by virtue of the first proviso to § 13 of the act of March 3, 1899, known as the Navy Personnel Act, subject to a reduction of fifteen per centum on his pay as for service "on shore" between December 2, 1899, when relieved as commanding officer of the *Lancaster* at Barbados, West Indies, and ordered to report to the Navy Department, and February 7, 1900, when he took command of the *Baltimore*, at Hongkong, and also on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong;

Whereas said court should have held that he was entitled by virtue either of the opening clause of said § 13 or under the second proviso thereof to the full pay of a colonel of more than twenty years' service in the Army, $4,500 a year, without any reduction whatever.

III. BRIEF OF ARGUMENT.

PART I.

Ten Per Cent Increase of Pay Proper.

The principal question is the right of the claimant to an increase of ten per cent on his pay proper while serving after May 26, 1900, in the waters of the Philippine Islands and China, and after March 2, 1901, while performing sea service in those and other waters beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

His right to this pay depends upon the Army Appropriation Acts of 1900 and 1901 as made applicable to the Navy by the opening or enacting clause of § 13 of the Personnel Act of 1899. These acts in so far as they have any application to this case are as follows:

Navy Personnel Act of March 3, 1899
(30 Stat. L. 1007).

An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States.

Be it enacted, etc. *** * * Sec. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:**

Provided, **That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:**

Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: * * * [March 3, 1899.]

Army Appropriation Act of May 26, 1900
(*31 Stat. L. 211*).

Be it enacted, etc. * * * That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace: * * * [May 26, 1900.]

Army Appropriation Act of March 2, 1901
(*31 Stat. L. 903*).

Be it enacted, etc. * * * That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

Provided further, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be

allowed and paid for such service the same increase of pay proper as is herein provided for: * * * [March 2, 1901.]

Effect of These Acts.

Between May 26, 1900, and March 2, 1901, the claimant was commanding officer of a vessel of the United States Navy on the Asiatic Station in Philippine and Chinese waters, taking part in the military operations against the Philippine insurrectionists and for the relief of the legations at Pekin. After March 2, 1901, he continued to command vessels of the Navy, partly at various points on the Asiatic Station and partly en route to the United States. He arrived at San Francisco June 12, 1901, to which date his claim extends.

His services between May 26, 1900, and March 2, 1901, are described in detail in Findings VIII–XII (Record, pp. 8, 9).

From March 2, 1901, to the date of his arrival in the United States, June 12, 1901, they are shown in Finding II (Record, p. 6) and in the tabular statements constituting Findings V and VI (p. 7).

The act of March 3, 1899, gives to an officer of the Navy the same pay and allowances as are or may be provided by or in pursuance of law for an officer of corresponding rank in the Army.

The act of May 26, 1900, gives to an officer of the Army an increase of ten per cent on his pay while serving in certain places therein designated.

The act of March 2, 1901, gives to an officer of the Army ten per cent increase of pay while serving anywhere beyond the limits of the States of the Union and contiguous territories.

The right of the claimant as an officer of the Navy to the same increase of pay is therefore established by show-

ing that he served in the localities designated in the army statutes.

As to the period covered by the act of March 2, 1901, there can be no question as to this fact. From that date until June 12, 1901, the claimant was beyond controversy "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Were it not for the vigorous opposition to this claim on the part of the learned Assistant Attorney-General and the fact that the Court of Claims in its original decision (Paragraphs 3, 4, 5, pp. 12–14) misapprehended the basis of this claim, we should think discussion of this part of the claim a waste of time. This opposition makes necessary by way of answer to the various objections a complete discussion of the statutes relied on as well as a direct response to each adverse argument.

As to the period from May 26, 1900, to March 2, 1901, the objection is made that the claimant did not literally serve "in the Philippine Islands" and "in China," since the service was rendered in Philippine and Chinese waters. This objection is so plainly over-refined that it hardly needs a reply. Being secondary in importance it will be reserved for discussion until the various statutes are themselves more fully considered.

The contention of the claimant was adopted by the Court of Claims in its final opinion (Record, pp. 23, 24). A study of these acts will confirm the correctness of this conclusion.

Analysis of the Act of 1899.

The object of the opening clause of § 13 of the Personnel Act, *ante*, page 8, upon which this claim rests is to assimilate the compensation of officers of the Navy to that of officers of corresponding rank in the Army. This is

clearly stated in the opinion by Mr. Justice Day in *Gibson* v. *United States* (194 U. S. 182, 192):

"The later act distinctly provides that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same compensation and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. This section was intended to cover and in exact terms provides for all pay and allowance for naval officers except forage. Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank."

The conclusion in that case was that the navy ration allowed by prior statutes to officers of the Navy is taken away by the Personnel Act because that act places them on a strict equality with Army officers as to all pay and allowances.

The same conclusion is reached by the Court of Claims in this case (paragraph 6, pp. 15–18).

Other decisions rendered by the Court of Claims affirm and apply the same principle.

In *Richardson* v. *United States* (38 C. Cls. 182) it is held that officers of the medical corps of the Navy are entitled to the pay prescribed by law for an officer of the Army "mounted" rather than to that of an officer "not mounted" on the ground that all army surgeons of corresponding rank receive mounted pay whether in fact mounted or not.

The Comptroller of the Treasury in a decision dated January 11, 1904, says after quoting from that decision (10 Decs. Comptrollers of the Treasury, 523, 526):

"This decision was not appealed from, and has been accepted as the proper interpretation of the law."

He therein applies to the officers of the pay corps the decision of the Court of Claims in favor of mounted pay to the medical corps of the Navy. He holds that pay officers are entitled to mounted pay on the ground "that wherever Congress has provided for the appointment of paymasters for the Army they have given them mounted or cavalry pay" (pp. 527, 528).

In *Crosley* v. *United States* (38 C. Cls. 682) an aid to a rear-admiral in the Navy is held entitled to the same pay as an aid to a major-general in the Army.

In *Chauncey Thomas* v. *United States* (38 C. Cls. 70) mileage is awarded to an officer of the Navy under circumstances which would entitle an officer of the Army to it. Mileage is allowed in this case on the authority of that (Paragraph 1 of original opinion, Record, pp. 11, 12; final opinion, foot of p. 24 and top of p. 25).

In another case of the same officer, Chauncey Thomas, not yet reported in the regular series, the court applies to the Navy the provisions of an army act (April 26, 1898, § 7, 30 Stat. L. 365) granting to an officer exercising in time of war a command higher than that pertaining to his grade the pay and allowances of the grade appropriate to the command so exercised. This decision is in part quoted (10 Comptrollers' Decisions, 123) as follows:

"In the case of Chauncey Thomas, who was in temporary command of the U. S. monitor *Monadnock*, serving in the Philippine waters, the Court of Claims decided January 5, 1903, as follows:

"'The language of section 13 providing that the officers therein referred to "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army," is broad enough, we think, to include the prior act, which grants to an officer in the Army exercising a command above that pertaining to his grade "the pay and allowances of the grade appropriate to the command so exercised."'"

The principle of equality of pay between the Army and the Navy established by the act of 1899 has thus been strictly upheld by every judicial decision rendered under the act. These decisions in effect follow those made by this court and other Federal courts under the act of 1834, now embodied in Section 1612 of the Revised Statutes, which assimilates the compensation of the Marine Corps to that of the Army. These decisions are hereinafter (pp. 39, 40) treated in detail.

Analysis of Acts of 1900 and 1901.

The act of 1900, *ante*, page 9, was a substitute for a part of Section 6 of the Army Organization Act of April 26, 1898, as follows:

"That in time of war the pay proper of enlisted men shall be increased twenty per centum over and above the rates of pay as fixed by law." (30 Stat. L. 365.)

The act of 1900 made two changes from that of 1898. It extended the increase of pay proper to the officers, although giving them only one-half the percentage of increase granted to enlisted men. It changed the ground of the allowance by making it dependent upon *place* of service instead of upon *time* of war. It defined the place specifically.

The act of 1901 continued the discrimination on the ground of place, but extended the field of increase to all localities "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

By both acts Congress classified the officers of the Army according to place. The ground of classification appears upon the face of each statute. That of 1901 is based upon a division of the officers into (*a*) those serving at the home of the American people in the States of the Union and

their contiguous territories, and (*b*) those serving beyond those limits. One class, those serving within the limits of the States comprising the Union and the Territories of the United States contiguous thereto, are to continue to receive pay according to pre-existing law. The other class, those serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, are to have their pay proper increased by ten per centum.

The grant is not of extra pay. Its language is "That hereafter the pay proper of all officers * * * shall be increased ten per centum"; and the subsequent proviso refers to it (top p. 10) as "the same increase of pay proper as is herein provided for." It is therefore an increase of pay proper and in no respect payment for extra services.

As affecting the pay of an army officer of rank and length of service corresponding to that of the claimant in this case it is as if the act read in connection with Revised Statutes, §§ 1261, 1262, 1263, 1267:

"Hereafter the annual pay proper of a colonel of over fifteen years' service when serving within the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be $4,500 and when serving beyond said limits $4,500+450=$4,950."

The Navy Personnel Act Self-operating.

The Army being thus classified, the Navy Personnel Act by its own force classifies the officers of the Navy in the same way. Where a classification for pay purposes is so clearly made by the statute that the words contain no ambiguity in themselves, the only requirement to entitle an officer to the benefit of the act is that he shall show that he is within the class entitled to the increased pay.

It is just as easy to determine whether an officer of the Navy is serving beyond the limits of the States compris-

ing the Union and the Territories of the United States contiguous thereto as it is to determine whether an officer of the Army is serving beyond those limits. This fact being determined in his favor, the right to the increase follows as a matter of course.

The Expression Declares the Intent.

The meaning of a statute must first be ascertained from its terms. If these are not ambiguous there can be no resort to the reasons which may be supposed to have influenced Congress in legislating. This principle is the commonplace of statutory construction. (*Dewey* v. *United States*, 178 U. S. 510, 520, 521.)

Here are three acts to be read together. The first, the act of 1899, says that changes in army pay are to affect also the Navy. The second, that of 1900, gives an increase of pay to army officers when serving in certain parts of the world. The third, that of 1901, gives an increase of pay to army officers when serving anywhere in the world outside of their home country.

The only question in the case of a naval officer is whether he is serving in the same parts of the world or beyond the limits referred to as the standard of increase for the army officer.

Pay Statutes Literal.

To no class of statutes is the rule of literal construction more peculiarly applicable than to those providing for the compensation of public officers. Such statutes are in their nature more or less arbitrary, sometimes giving a particular officer more and sometimes less than his services might be regarded as worth if they were estimated upon a *quantum valebant* basis. This truth will be even more apparent when an application of army pay statutes to other branches of the public service is attempted. Any

change in the pay of the Army at once affects not only that of the Navy under the Personnel Act, but also that of the Marine Corps (Revised Statutes, § 1612) and of the Revenue Cutter Service (Act of April 12, 1902, § 3, 32 Stat. L. 100). The application of an army pay statute to any of these branches of the public service can not be made to depend upon a requirement that some special reason be shown in every case for applying the act not only to the Army but to the Navy, the Marine Corps and the Revenue Cutter Service. Perhaps the reason will apply directly to one, but only indirectly or not at all to another of these branches of the public service. It is thus particularly necessary to enforce every army pay statute literally in applying it to these other organizations. Any other rule would only be productive of the utmost confusion and uncertainty where Congress has enacted an intelligible, because uniform, rule.

An Intelligible Reason.

While Congress is itself the judge of the reasonableness of its own plain acts, and no officer after bringing himself within the terms of those acts can be required to go further and show himself to be within some supposed intent, yet the reasons for the application of this statute to the Navy are as clear as in the case of the Army. Naval officers serving abroad are usually compelled to leave their families at home with all the attendant expenses of the home establishment, while at the same time mess and other personal expense bills must be met by themselves abroad, these expenses being frequently increased by reason of their great distance from home. The Government no longer makes the contribution to the payment of mess bills formerly given in the sea ration (*Gibson* v. *United States*, 194 U. S. 182, 191, 192). If they are cut off from the sea ration because, though peculiarly

appropriate to the Navy, it is an allowance not granted to the Army, the ten per cent increase granted to the Army can not be withheld from them on the ground that the conditions of the naval service make it inappropriate to the Navy. Under such conditions, they would receive neither the benefit granted by the old navy law nor that given by the new army law to officers separated from their families and living at a distance from home.

Service in Philippine and Chinese Waters.

There remains a question whether the service rendered by the claimant in the waters of the Philippine Islands and China between May 26, 1900, and March 2, 1901, is service "in the Philippine Islands" within the meaning of the act of May 26, 1900, or "in China" within the meaning of the proviso to that of 1901.

Details of Service.

The service of the claimant between those dates is very fully detailed in Findings VIII–XII (Record, pp. 8, 9), as follows:

"VIII. On May 26, 1900, while the claimant was in command of the U. S. S. *Brooklyn*, she left Hongkong and went directly to Cavite. While at Cavite she remained in the bay of Manila, off the naval station, about a half mile from Sangley Point and two miles from Cavite.

"IX. On leaving Cavite, on June 26, 1900, the vessel went to Hongkong for diplomatic reasons connected with the disturbed condition of affairs in China. Beside her regular complement of men, she had on board 19 marine officers and a battalion of 300 marines. The vessel then proceeded to Taku, stopping at Nagasaki, Japan, to coal, and at Chefoo to inquire as to the condition of the *Oregon*. The anchorage of the *Brooklyn* was about 12 miles off the mouth of the Peiho River in the Gulf of Pechili, it being impossible to approach nearer with so large a vessel, on

account of shallow water. The *Newark* was there present on the arrival of the *Brooklyn*, and the *Yorktown* and the *New Orleans* arrived later, as well as the dispatch boat *Zafiro*, and the *Buffalo*. All of the naval powers of the world were represented there by about fifty war vessels, and the presence of the *Brooklyn* there was on account of the Boxer difficulties then existing in north China. The *Brooklyn* cooperated with the army on shore by assisting them to land, providing them with steam tenders and steam launches, and towing them from the anchorage to Tongku. There were frequent conferences on board the *Brooklyn* between the military authorities and the admiral and other officers. General Chaffee boarded the *Brooklyn* on his arrival to consult the commander in chief, and the army quartermaster in charge of transportation was in frequent conference in regard to the facilities for landing the United States troops. The marines on board the *Brooklyn* under Colonel Meade, were landed, and the commander in chief of the naval force went up to Tientsin in person, after the fight at Tientsin, to investigate the condition of the marines there. The officers of the army in passing visited the *Brooklyn* to pay their respects to the commander in chief as the senior military representative of the United States in China, and those of higher rank called to consult him as to the state of affairs on shore. The flagship *Brooklyn* had a representative on shore in connection with the military operations, Lieut. Julian L. Latimer, detailed as a naval aid to General Chaffee, who remained with him for a period of about six weeks. He accompanied him in the expedition for the relief of Pekin, and was present at the capture of Pekin and the retreat of the Chinese forces. His principal duty was to keep the commander in chief thoroughly advised of the state of affairs, and this information was communicated to the Government at Washington by cablegram, through the naval dispatch boat *Zafiro* carrying all messages to Chefoo. On the return of the *Brooklyn* to Cavite, leaving Taku on October 11, 1900, the vessel stopped at Nagasaki and replenished with coal, going thence to Shanghai, anchoring at Woosung, the man-of-war anchorage for Shanghai, and coaled ship there.

"X. On reaching Cavite, on November 3, 1900, the *Brooklyn* anchored off the city of Manila, where it served as the headquarters of the commander in chief in the Philippine waters. She was used to transport the governor-general of the Philippines for a tour of inspection to Olongapo, keeping on that trip from half a mile to 3 miles from land. She went to Iloilo to permit an inspection by a board ordered by the Navy Department to select a naval station in the Philippines, keeping distant from shore on that trip from an eighth of a mile to 2 miles. She took another trip to Olongapo in connection with the investigation of a naval station, going and returning by substantially the same route as on the former trip. Between these trips, and afterwards until leaving Manila, the vessel remained at headquarters on the station.

"XI. While at Hongkong in February, 1901, the vessel was at the Kowloon dockyard being docked and undergoing minor repairs.

"XII. After the return of the *Brooklyn* to Cavite she became headquarters on the station again in the bay of Manila, and so continued until after March 2, 1901."

The Service Within the Statute.

The *Brooklyn*, of which the claimant was commanding officer, was thus occupied during the entire period from May 26, 1900, to March 2, 1901, in the conjoint military operations of the Army and Navy in the Philippine Islands and China. These services entitle the claimant to the ten per cent increase,—

1. Because he literally served "in the Philippine Islands" and "in China."

2. Because naval service rendered at sea is of a character corresponding to army service on shore in the Philippine Islands and in China

A Literal Identity.

1. The terms used in their natural and ordinary meaning cover service in the waters of the Philippine Islands

and China. Waters within a limit of three miles are by international law within the territory and jurisdiction of the nation possessing the shore. Perhaps this test does not apply in all its strictness in these cases. This statute can not be fairly construed to deprive an officer cruising among the Philippine Islands of the benefits of the increase the moment his ship happened to get beyond the three-mile limit. On the other hand, under the later act of 1901, an officer sailing with his ship from New York to Newport could hardly claim, within the intent of the statute, to be serving beyond the limits of the States comprising the Union, even though for a part of his voyage he would be beyond the three-mile limit.

A more reasonable test was applied by Attorney-General Cushing in 1855 (7 Opinions, 299) in treating the words "who served in the Pacific Ocean on the coast of California and Mexico," the material portion of his opinion being hereinafter quoted, pages 42, 43.

The War and Treasury Departments, too, in applying this statute of 1900 to service of army officers treated it as covering service in Philippine waters equally with land service. The Army had a fleet of gun boats in Philippine waters under the command of army officers during this same period, and these officers received the ten per cent increase on their pay provided by the act of 1900. "Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900." (Last Paragraph Finding XV, foot of page 9.)

Such payments are founded upon a correct construction of the law, service "in the Philippine Islands" clearly including service afloat in the waters of those islands as well as service ashore.

If, before officers of the Navy can receive the increase

for their service at sea in the waters of the Philippine Islands, it is necessary to show that officers of the Army have also received it for service at sea, that requirement is amply met.

A Real Correspondence.

2. But it is not necessary to show identical service on the part of an officer of the Navy to that of an army officer to entitle him to army pay. It is sufficient to show correlative service. The normal duty of the army officer is on land. The normal duty of the naval officer is at sea. Hence the correlative duty to entitle an officer of the Navy to full pay of the corresponding rank in the Army is sea, not shore duty. Naval officers are entitled to have these words of place read with relation to the varying conditions of the two services. Cruising among the Philippine Islands is the naval equivalent of campaigning on the Philippine Islands. Protecting American interests in Chinese waters and threatening Chinese forts is the naval equivalent of the Army marching to the succor of besieged Americans in Pekin. Each is service in the Philippine Islands and in China, and this is the only condition of the increase. When therefore the army law gives to an army officer an increase of pay for service in the Philippine Islands and in China, the principle of equal pay for corresponding service gives a naval officer the same increase of pay for the appropriate service of the naval branch in a corresponding place, namely in Philippine and Chinese waters.

The claimant, therefore, while commanding a vessel of the Navy, in Philippine and Chinese waters from May 26, 1900, to March 2, 1901, was "serving in the Philippine Islands" and "in China" within both the letter and the spirit of the acts of 1900 and 1901.

Defenses.

This completes the presentation of the claimant's case, and would be all that we would submit were it not for certain defenses urged by the Attorney-General and in part noticed in the original opinion of the Court of Claims.

These defenses are as follows:

1. That the acts of 1900 and 1901, granting the ten per cent increase to officers of the Army are not applicable to the Navy.

2. That the increase is granted to compensate army officers for greater hazards which are not suffered by naval officers.

3. That the proportion of officers of the Navy affected is so great as to embrace practically all officers doing sea service.

4. That the increase is granted for shore service only.

5. That enlisted men in the Navy receive no increase of pay for service beyond the continental limits of the United States; therefore officers should not receive it.

These defenses will be taken up in their order.

Ten Per Cent Increase Applies to the Navy.

It is first urged on behalf of the United States that the act of 1900, granting increased pay to officers of the Army serving in designated localities, and that of 1901, granting such increase to all serving beyond the limits of the States and Territories of the Union, do not constitute legislation of the character contemplated by that part of Section 13 of the Personnel Act which provides that officers of the Navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

This objection strikes at the whole life of the Personnel Act, and is fatal to anything like equality between the officers of the Army and of the Navy. The pay of an officer of

the Army of any given rank is not a fixed and unchangeable amount, but varies greatly with circumstances.

Officers of the Army receive grade pay (Revised Statutes, § 1261) and increased pay for each five years of service in the Army (Revised Statutes, § 1262). If a classification of officers of the Army by place of service does not equally apply to those of the Navy, neither should a classification by length of service apply.

Their pay in several grades differs for officers "mounted" and "not mounted" (Revised Statutes, § 1261). "Mounted" pay often depends upon other conditions than being actually mounted; hence "mounted" pay is received by many officers in the Navy, though the duties of a naval officer seldom if ever require an actual mount. (*Crosley* v. *United States*, 38 C. Cls. 82; *Richardson* v. *United States*, 38 C. Cls. 182; 10 Comptrollers' Decisions, 523.)

Officers on waiting orders, absent from sickness or wounds, absent with leave for other causes, and absent without leave, receive varying rates of pay in the Army (Revised Statutes, § 1265), differing materially from the rates fixed by former legislation for the Navy (Revised Statutes, §§ 1556, 1557).

Officers retired from active service receive but one rate of pay in the Army (Revised Statutes, § 1274) which now of course applies to the Navy; though under the former law officers of the Navy had two different rates of pay on the retired list (Revised Statutes, §§ 1588, 1593).

Officers of the Army dropped from the service for incapacity, or as it is styled in the statute (Revised Statutes, § 1252) "wholly retired from the service," receive upon their retirement one year's pay and allowances (Revised Statutes, § 1275). Officers of the Navy under the old law (Revised Statutes, § 1505) when so dropped or wholly retired (Revised Statutes, § 1454) received no pay on being retired.

Officers of the Army exercising a higher command in time of war receive increased pay while so exercising it. This was not allowed by previous legislation to the Navy; but the Navy now receive the benefit of this army law. (*Chauncey Thomas* v. *United States*, quoted, *ante*, page 13.)

An aid to a major-general in the Army receives (Revised Statutes, § 1261) "$200 a year, in addition to pay of his rank." The Court of Claims has decided in favor of this special increase of pay in the case of an aid to a rear-admiral. (*Crosley* v. *United States*, 38 C. Cls. 82.)

The allowances of the Army which are in express terms granted to the Navy with the exception of forage are all for occasional service.

The principle of the Personnel Act is well summarized by the learned Chief Justice of the Court of Claims in his dissenting opinion in this case, a principle now adopted by the court in its later opinion, as follows (Record, p. 18):

"It was inevitable that in the application of army law to naval services doubts should arise, but in the application of the statute, the statute has given us one plain rule for guidance, and that is that the pay of army officers and navy officers in like official circumstances shall be precisely alike, save one exception hereafter to be named."

And again (p. 19):

"The controlling purpose of the Navy Personnel Act being to make navy pay and army pay identical, it becomes the controlling principle by which the statute should be interpreted. The end always to be attained is that the pay of an officer of the Navy shall be the same as the pay of an officer of the Army of relative rank in the same official circumstances."

And finally (p. 20):

"As the army pay became the pay of the Navy when navy pay was abolished, so the different kinds of army pay become the pay of naval officers when the conditions of

their official duty require a departure from regular or active service pay. Ordinary pay, longevity pay, staff pay, leave-of-absence pay, and waiting-orders pay of the Army become the ordinary pay, the longevity pay, the staff pay, the leave-of-absence pay, and the waiting-orders pay of naval officers."

But the most striking analogies under this branch are afforded by the interpretation placed by this court upon the act of 1834, now Section 1612 of the Revised Statutes, in the case of *United States* v. *Freeman* (3 How. 556), which, with other cases under the same act is hereinafter more fully referred to, *post*, pages 39, 40. Here nearly every item depended upon some provision fixing some special rate of pay under peculiar circumstances for the Army; and that rate of pay was in each instance allowed to or withheld from the Marine Corps according as the army officer would or would not be entitled to it.

To place any other construction upon the legislation now before the court would be fatal to all equality between the Army and the Navy, and would reintroduce that very inequality between them which it was the object of the Personnel Act to remove.

Hazards Immaterial.

It was suggested in the first opinion of the Court of Claims (p. 14) that the increase to officers of the Army was in recognition of extra hazards attending their service in the Philippine Islands and China arising out of the climatic conditions, oriental and uncivilized modes of warfare, and contagious diseases.

The simple answer to this position is that no such condition is expressed in the act, while we may go even further and show that the possibility even of an implication that that was its object disappears on an examination of the act as a whole.

The act of 1900 names five countries, Porto Rico, Cuba, the Philippine Islands, Hawaii, and Alaska, a sixth, China, being retroactively included from May 26, 1900, by the act of March 2, 1901. Conditions of hazard or hardship do not exist in any of these countries except the Philippine Islands and China. Porto Rico enjoys a delightful winter climate, and even in summer the heat is tempered by sea breezes. In Cuba hostilities were over nearly two years before the passage of the act of 1900, and the country had by the time of the passage of that act become entirely salubrious under the vigorous sanitary measures taken during our occupation. As to the Hawaiian Islands, "Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America," etc. (*Hawaii* v. *Mankichi*, 190 U. S. 197, 211.) Alaska is likewise a peaceable and very healthy country, inhabited by no uncivilized races except a few peaceable Indians. Its southern parts, where most of the Army and Navy are sent, have a very mild climate even in winter.

There is no distinction of time, place, or condition in the Philippines for the grant of the increase. The army officers who endured the greatest hazards and hardships in the capture of Aguinaldo received the same increase as the officer having the lightest office duty in the city of Manila. There was no greater rate of increase in 1900, when the Army was in active pursuit of a treacherous enemy in difficult territory than there is at present when the civil Government is in supreme control.

On July 4, 1902, the President by his Philippine Amnesty Proclamation declared, "The insurrection against the authority and sovereignty of the United States is now at an end, and peace has been established in all parts of the archipelago, except in the country inhabited by the

Moro tribes, to which this proclamation does not apply." (32 Stat. L. 2014.)

Yet notwithstanding the restoration of peace in all but an insignificant portion of our possessions, the ten per cent increase goes on, and was indeed re-enacted contemporaneously with the proclamation (32 Stat. L. 512). This of itself is a sufficient answer to the contention that it is granted by reason of conditions of warfare. Locality, not hazard, is the test prescribed by the statute for the right to the increase.

Moreover, how can it be said that officers of the Army serving in the Philippines or in any other part of our new possessions are incurring "extra hazards"? To guard our outlying possessions has always been the duty of the Army and can in no respect be regarded as extra service.

A Question of Place Alone.

The discrimination actually made by Congress is in the place of service alone. This is exactly expressed. The statute neither expresses nor implies any discrimination on account of "extra hazards," "climatic conditions," "oriental and uncivilized modes of warfare," or "contagious diseases." To interpret the statute with any such distinction would be to substitute for the expressed legislative will a judicial view of what constitutes a proper rule of legislation.

Since the place of service alone gives title to the increased pay to army officers, the increased pay must be awarded in the statutes without regard to considerations not found in the legislation of Congress.

Proportion of Officers Entitled.

The question of the proportion of officers entitled seems to us entirely immaterial. Yet the position is taken by

counsel for the United States that a concession of this increase to the Navy would in effect give the ten per cent to nearly all officers on sea duty. Immaterial as this statement is, we can not allow it to pass without showing its groundlessness.

At the date of the passage of the act of May 26, 1900, the Army consisted of 3,952 officers and 96,474 enlisted men, of whom 2,770 officers and 70,442 enlisted men were serving in the several countries named in the act of 1900 as those for service in which increase of pay proper was granted. (Annual Report War Department, 1900, vol. 1, part 2, tables facing p. 30.) At the time of the passage of the act of March 2, 1901, the Army consisted of 4,103 officers and 96,924 enlisted men, of whom 2,474 officers and 62,176 enlisted men were "serving beyond the limits of the States comprising the Union and the territories of the United States contiguous thereto. (Annual Report War Department, 1901, vol. 1, part 2, tables facing p. 30.) In other words, in 1900 about three-fourths of the Army became entitled to this increase of pay proper, and in 1901 about two-thirds. An increase of pay which includes in one instance all but a third and in the other all but a fourth of the Army, certainly can not be said to be based upon the ground of extra hazard or hardship. The increase of pay which was received was the rule in the Army. The failure to receive it was the exception.

In the Navy the proportion of officers affected by both acts is less than in the Army. The Navy List for July, 1900, shows officers on the active list entitled to army pay as follows:

Line	921
Medical Corps	183
Pay Corps	135
Total	1,239

The officers of the same branches of service then in the localities named in the act of May 26, 1900, are shown in the same document as follows:

Philippine Islands and China, counting all on vessels on the Asiatic Station, except the *Culgoa*, then in Australia, and including the U. S. S. *Buffalo*, *Calamianes*, *Solace*, and *Yosemite* (Report of the Bureau of Navigation for 1901)		263	
Philippine Islands and China, on shore .	16		
Cuba and Porto Rico, on vessels in those waters (Rep. Bu. Nav. 1901—*Uncas*, p. 75; *Vixen*, p. 77)		8	
Cuba and Porto Rico on shore	5		
Hawaii, on vessel (*Iroquois*)		2	
Hawaii, on shore	2		
Total	23	273	296

To concede to the Navy in the waters of the places named the benefit of this army act gives the extra pay an extension far less in proportion than it possesses in the Army.

In July, 1901, there were 1,234 officers on the active list entitled to army pay, as shown by the Naval List of that date. The number on sea duty "beyond the limits of the States" and contiguous territories may be stated as follows from the same source:

ASIATIC STATION:	
At sea, as shown in the Navy List for July, 1901, and including the *Bennington*, *Castine*, *Concord*, *Marietta*, *Newark*, and *Petrel*, returning from Asiatic Station (Navy List, July, 1901, p. 71), and the *Solace* on special service (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 80) .	330
SOUTH ATLANTIC STATION:	28
Carried forward	358

Brought forward		358
NORTH ATLANTIC STATION:		
Mayflower, on special duty in West Indies (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 67)	8	
Yankton, on special duty in Porto Rico (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 90)	5	
PACIFIC STATION:	—	13
Abarenda,—Samoa	6	
Philadelphia, in Hawaii (Rep. Bu. Nav. 1902, p. 73)	15	
	—	21
Training Ships outside United States waters in July, 1901:		
Alliance (Rep. Bu. Nav. 1902, p. 33)	9	
Hartford (Rep. Bu. Nav. 1902, p. 55)	13	
Monongahela (Rep. Bu. Nav. 1902, p. 69) . .	12	
	—	34
Station Ships at—		
Guam—*Brutus*	9	
Honolulu—*Iroquois*	1	
	—	10
		436
Shore duty in July, 1901, at—		
Guam (Navy Reg. Jan. 1901, p. 163)	4	
Havana	2	
Hawaii	3	
Philippine Islands	22	
San Juan	3	
Samoa	1	
Yokohama	2	
	—	37
Total outside the United States		473

This is 146 less than one-half the officers of the Navy or 38 per cent, as against two-thirds of the officers of the Army entitled to receive the ten per cent increase under

the rule of equality for which this claimant is now contending.

Of course even were the proportion much greater, the rule of law would not be altered. As a matter of fact, however, only a minority of the officers of the Navy would be entitled to this increase, while a majority of those in the Army were entitled to and received it during the time covered by this claim.

Increase Not Controlled by Shore Service.

It is argued that as the army service for which the increase is granted is shore service, the only naval service to which the increase can apply is shore service.

To this there are two complete answers:

1. That the army in numerous instances receives this increase for services at sea.

2. That the language of the statute is inconsistent with any such distinction.

Army Sea Service.

There are several cases in which army officers serving afloat receive this increase. We have already, *ante*, page 21, discussed the Army gunboat service on which many officers served. It appears as to both them and the Army transports:

"It has been the practice of the Pay Department to pay officers of the Army serving on board U. S. Army transports the ten per cent increase of pay provided for by act of March 2, 1901, from date of departure from the United States to date of their return thereto, inclusive.

"Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900." (Finding XV, Record, p. 9.)

The Army transport service here referred to was of

great magnitude at the time this claim originated and is still quite large. A report made by the Secretary of War, February 21, 1902, in response to a resolution of the Senate, shows that during the period (1900–1901) covered by the present claim the Government was the owner of twenty-four transports, purchased for $7,710,344, and repaired at an expense of near $10,000,000. (Senate Document 369, 57th Congress, 1st Session; as to purchase, page 5; as to repairs, page 19.)

In addition to these vessels owned by the Government forty-three others owned by private parties were in the service under charter, their total charter-party valuations amounting to $12,250,000. ("Partial list of the chartered vessels on the Pacific Coast engaged in the transport service to Manila, &c." Senate Document 186, 56th Congress, 2d Session.)

The act of 1901 also in express terms allows this increase from the date of departure from the United States to the date of return thereto; thus necessarily involving in every instance a large amount of time spent by the army officer at sea without the performance of any duty but traveling.

Officers of the Army thus receive it when on duty in the prescribed localities, whether at sea or on land. Shore service is not a condition of increase in the Army and can not be in the Navy.

Naval Appropriation Act 1901 (*31 Stat. L. 1108*).

The claim in this case to the benefit of the army acts of 1900 and 1901 is based upon the opening or enacting clause of section 13 of the Navy Personnel Act of 1899, *ante*, page 8.

The Court of Claims in its original opinion conceived it to be a claim based upon the second proviso to that act, as of an officer "detailed for shore duty beyond seas." In

the second opinion this error is thus adverted to (Record, pp. 23, 24):

"As the primary purpose of those acts was to grant to officers and enlisted men in the Army 10 per cent increase on condition of their service in China, Cuba, and the territorial possessions named, the court in its former opinion labored under the belief that to entitle naval officers to such increase it was incumbent upon them to show that they had, in the language of the second proviso to section 13, been 'detailed for shore duty beyond seas'; that is to say, to entitle naval officers to the 10 per cent increase it was held that they must perform shore service beyond seas at places similar to those where officers of the Army were detailed for duty."

The fact that this view was insisted upon by the United States and at first sustained by the court, renders it necessary to review an act deemed by us to have no legitimate place in the discussion. The act provides (31 Stat. L. 1108):

"That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States. * * * (March 3, 1901.)"

The history of this legislation explains its meaning. After the passage of the act of March 3, 1899, naval officers on shore duty in the Philippines claimed full army pay on the ground of being "detailed for shore duty beyond seas," as provided for in the second proviso of Section 13. The Comptroller of the Treasury decided that the words "beyond seas" mean "beyond the jurisdiction of the United States"; and the Philippine Islands being within

the jurisdiction of the United States are therefore not "beyond seas."

The Paymaster-General of the Navy complained of this decision as follows:

"This decision operates to reduce the pay of all officers serving in those islands who are paid under the army schedule to the pay they would receive if serving in the United States, or 85 per cent of their sea pay." (Report of the Secretary of the Navy for 1900, p. 942.)

The Secretary of the Navy concurred in this view as follows:

"It has been held by the accounting officers of the Treasury—contrary, it seems to this Department, to the spirit and to the familiar interpretation of the letter of the statute—that Porto Rico, the Hawaiian Islands, Guam, and the Philippines, because they are now a part of our own territory, are therefore not "beyond seas" within the meaning of the statute above quoted. Consequently, officers serving in those islands do not receive the same pay as officers of the Army doing similar duty, but receive the same pay as if serving on shore within the continental limits of the United States—that is, 85 per cent of their sea pay. Further, this decision is retroactive in its effect, and it will accordingly be necessary to check against officers who have rendered service within the island possessions of the United States, and who have received full pay therefor, the difference between sea pay and shore pay for the entire period of such service.

"Believing that it was the intention of Congress to place naval officers assigned to such duty upon an equal footing with army officers similarly situated, it is recommended that the statute be so amended as to afford the desired relief." (Report of Secretary of the Navy for 1900, p. 8.)

In consequence of these recommendations, Congress inserted the provision just quoted in the naval appropriation act of 1901.

The Court of Claims has pointed out its object in *Irwin*

v. *United States* (38 C. Cls. 87; see particularly foot of p. 100). It is simply to cure a misconstruction by the Comptroller of the Treasury of the expression "shore duty beyond seas" as used in the second proviso to Section 13 of the Personnel Act. Neither the original proviso nor this legislative construction of it contains anything affecting the pay of an officer on sea duty. Certainly nothing in the exceptional grant of full pay for shore duty when performed beyond seas indicates in the remotest manner an intention of Congress to deprive an officer of the Navy performing his normal duty at sea of the full pay allowed to an officer of the Army.

So, too, this provision so far as applies to the officers and enlisted men of the Marine Corps, was passed to cure a specific evil which Congress was called upon to correct.

The Secretary of the Navy said (Annual Report, 1900, pp. 8, 9), in immediate sequence to the passage we have already quoted (rec. pp. 153, 154):

"In this connection attention is invited to the hardships suffered by officers and men of the Marine Corps detailed to shore duty in Guam or in China. The Army appropriation act, approved May 26, 1900, provides that 10 per cent additional pay shall be given to officers and 20 per cent additional pay to enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and the Territory of Alaska. This provision is applicable to the Marine Corps, but, being specific in its terms, is limited to the places designated, and is not operative elsewhere. Consequently, officers and men of the Marine Corps who were sent to Guam or China from Porto Rico, Hawaii, the Philippine Islands, or Alaska, lost the increased pay given by the act of May 26, notwithstanding the fact that they were subjected to the additional expense and hardships attendant upon foreign service."

The proviso to the act of 1901 so far as it applies to officers and enlisted men of the Marine Corps, was passed in

response to this recommendation of the Secretary of the Navy. It can therefore be construed as neither an implied repeal nor a legislative construction of the act of May 26, 1900, in a particular not brought to the attention of Congress.

Much less can it be held either to repeal or to construe the act of March 2, 1901, which went through its legislative stages concurrently with but independently of that of March 3, 1901.

The irrelevancy of this act to the case now under discussion will best be seen by stating separately the sequence of events relating to this case and the sequence in relation to the question of shore duty beyond seas.

The sequence in relation to the present case is—

1. The act of March 3, 1899, Section 13, opening clause, grants army pay to naval officers.

2. The acts of 1900 and 1901 increase the pay of army officers serving in certain localities.

3. Naval officers serving at sea in the same localities are denied by the Comptroller to be entitled to the increase granted the army officers.

4. They bring suit in the Court of Claims to obtain the benefit of the increase.

In relation to the full pay of an army officer for "shore duty beyond seas" the sequence is as follows:

1. The act of 1899, § 13, second proviso, gives to officers of the Navy on "shore duty beyond seas" the full pay of army officers.

2. Such full pay is denied by the Comptroller to officers on shore duty in the Philippine Islands.

3. The Navy Department recommends to Congress to overrule this construction of law.

4. Congress passes the act of March 3, 1901, to produce this result.

The purpose of that act is plain.

Is it to be inferred that by accident it has made an unintentional exception to the fundamental principle of equality of pay by the Personnel Act? If so, it would be the first discrimination ever made by any statute of the United States in the direction of giving a naval officer higher pay for shore duty than for sea duty.

The general rule is the precise opposite. (*Rodgers* v. *United States*, 185 U. S. 83, 92.) And where a statutory policy is long established legislation is generally construed in harmony therewith. (*Shurtleff* v. *United States*, 189 U. S. 311, 316.)

Seamen's Pay Immaterial.

It has also been argued in opposition to this claim that because § 1569 of the Revised Statutes authorizes the President to fix the pay of petty officers and enlisted men in the Navy and neither the President nor Congress has seen fit to increase the pay of those persons, therefore the officers of the Navy should not have an increase.

This reasoning could only be regarded as having force if the pay of the commissioned officers of the Navy were assimilated or proportioned by law to that of enlisted men. The statutory ground of comparison, however, of pay of naval officers is with that of army officers, not of navy enlisted men. It is useless to speculate as to why neither Congress nor the President thought fit to increase the pay of enlisted men in the Navy. Presumably it was because they were thought to be getting enough already.

Precedents.

Some precedents bearing on this question should now be reviewed in order to complete the record. They show that whenever a like question has arisen the ruling has been in accordance with that now asserted on behalf of the claimant.

Analogy of Marine Corps.

The provision of the Personnel Act assimilating the pay of the Navy to that of the Army, *ante*, page 8, is in language borrowed from that so assimilating the pay of the Marine Corps. This act was originally passed in 1834, and is now embodied in Revised Statutes, § 1612, as follows:

"The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for officers and enlisted men of like grades in the infantry of the Army."

In *United States* v. *Freeman* (3 Howard, 556) this court held that the following items of pay and allowances of the Army must be granted or denied to the Marine Corps according as they are granted or denied to the Army.

1. Pay according to brevet rank of officer commanding separate post;
2. Double rations to brevet field officer commanding separate post;
3. Extra pay of ten dollars a month to brevet officer commanding a company on account of responsibility for clothing, etc.

See also the opinion of *Mr. Justice Woodbury* in the Circuit Court after the case was remanded for new trial. (25 Fed. Cases, No. 15,163, p. 1211; 1 Woodbury & Minot, 45.)

In *Reid* v. *United States* (18 C. Cls. 625) it is said of the Marine Corps (p. 636):

"The pay of this corps is regulated by the laws which govern the pay of the Army, and as changes are made in the army pay, those changes take effect simultaneously

in the pay-roll of the Marine Corps. This is the legal effect of section 1612 of the Revised Statutes," etc.

In *Walton* v. *United States* (31 C. Cls. 196) the court says (p. 204):

"We rest the claimant's right to recover the additional pay of $2 per month provided by § 1284, as extended and made applicable to the enlisted men in the Marine Corps by § 1612, holding as we do that the enlisted men in the Marine Corps are on the same footing as 'enlisted men of like grades in the infantry of the Army,' both as to their regular pay and the $2 per month additional pay provided for by § 1284."

Opinion of Attorney-General Butler.

Attorney-General Butler in 1839 advised the Secretary of the Navy as stated in the syllabus, 3 Op. Attys.-Gen. 265:

"By the application of the act of the 2d of March, 1827, to the Marine Corps an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay and emoluments and allowances allowed to an assistant quartermaster in the Army similarly situated."

Opinion of Attorney-General Johnson.

A case coming even closer in analogy to the application of the acts of 1900 and 1901 to the Navy is found in an opinion by Reverdy Johnson when Attorney-General. He thus advises the Secretary of the Navy in 1849:

"Sir: I have considered the question submitted by you to this office, as to what is the proper construction of the joint resolution of the 10th of August, 1848, (Session acts p. 225,) making certain provisions for the officers, &c., of the Marine Corps 'who have served with the army in the war with Mexico.' (9 Stat. L. 340.)

"Two battalions of the corps, under the separate com-

mands of Lieutenant-Colonel Watson and Major Harris were, as you inform me, 'detached from the Navy, and transferred *pro tempore* to the army,' to serve with it, under Major General Scott's command, in the war. That these are entitled to the benefit of the resolution, is considered by you, and properly 'as clear and indisputable'; but the doubt is, whether any other part of the corps is entitled. Upon this point, my opinion is decisive. With all proper deference to the judgment of your predecessor in the department, who, as I understand, gave the resolution that limited construction upon which as yet it has been executed, my opinion is that such construction is neither consistent with its spirit nor language. The interpretation I give it is, that all the officers, non-commissioned officers, privates, and musicians of the corps who belonged to the vessels of the United States despatched to the Mexican coast, to aid in subduing the cities and ports of the enemy, and conquering the country, and who were there for the purpose, are equally embraced by the resolution with the particular detachments under Lieutenant Watson and Major Harris.

"All that is necessary to bring any portion of the corps within the scope of the provision is, that they should have 'served with the army in the war with Mexico.' Whether such service was on the land or on the water, if it were rendered in connection or association with the army, and to effect a common end—victory over and conquest of the enemy—it was 'serving with the army in the war.' The resolution prescribes no particular theatre of service. It is couched in general terms. Neither land nor ocean is, in any way, in words referred to. It is service generally, anywhere, and in any mode, during the war, in union with the army, that is intended to be provided for." (5 Opinions of Attorneys-General, 155, 156.)

And he concludes (p. 158):

"I answer your inquiry, then, by saying that, in my opinion, the entire portion of the Marine Corps, whether serving on land, or on board ship on the Mexican coast, in the Mexican war, are to be considered within the true meaning of the resolution of the 10th of August, 1848, as

having 'served with the army in the war with Mexico' and entitled to the 'bounty land and other remuneration' it provides."

Much stronger is the present case. There is here no requirement that the officers of the Navy shall be "with" the Army but only that all changes made in the pay of the Army shall take effect simultaneously upon that of the Navy.

Opinion of Attorney-General Cushing.

A case bearing especially upon the construction of the words "in the Philippine Islands" and "in China" as including sea service in the waters of those countries came before Caleb Cushing as Attorney-General in 1855 (7 Opinions, 299). An act was passed granting increased pay to officers and men of the Navy "who served in the Pacific Ocean on the coast of California and Mexico," since September 28, 1850. By a later act the same pay was granted for a previous period. The proper construction of the phrase quoted was submitted to the Attorney-General. He said (p. 301):

"It appears by the report of the Fourth Auditor, that when these acts came up for execution, careful consideration was given to the question, arising on the face of the act of August 31, 1852, as to the meaning of the very phrase now under examination, namely,— 'who served in the Pacific Ocean, on the coast of California and Mexico.'

"On the one hand, the specification of 'the coast of California and Mexico' seemed to confine the applicability of the act to the case of persons serving in a very limited range of the Pacific Ocean.

"On the other hand, it was found all but impossible to enter into discrimination of the precise times when a ship was cruising on the coast of the Mexican Republic, and when she was not actually on that coast, but still cruising in the Pacific Ocean, with more or less of reference to

the war; sometimes in harbor, sometimes cruising immediately on the coast, sometimes going from or returning to it, according to the condition of the weather or the exigencies of the service. Besides, it was perceived that 'coast' was a term of some vagueness or indefiniteness of construction.

"With these impressions present in the mind, the Secretary of the Navy and the proper officers of the Treasury proceeded to reflect on the liberally remedial objects of this series of acts of Congress, and came to the conclusion, on the whole, that the term 'Pacific Ocean' was employed in the act to distinguish from 'the Atlantic,' and that of 'the coast of Mexico and California' to distinguish from the cruising ground, and points of attention, of the ships on the coasts of China and the East Indies."

His conclusion was (p. 303)—

"as the act of 1853 was but a continuation back of the period of compensation for the same service, and as Congress must be intended to have had full knowledge of how those descriptive words of service had been construed by the Department, it seems to me that the repetition of the words constitutes a legislative adoption and sanction of that construction of the Department."

The construction given to that act is entirely applicable to the expressions of locality used in the acts of 1900 and 1901, particularly to support the construction of the words of place used in the act of 1900 as including the adjacent waters.

Decision of this Court on Sea Ration.

The recent decision of this court in *Gibson* v. *United States* (194 U. S. 182, 191, 192) has a decisive bearing upon this case. The claimant there urged that he was entitled to the old navy allowance of a sea ration on the ground that the new law in giving him army pay and allowances provided no substitute for the sea ration,—an allowance peculiarly appropriate to the Navy, for which

no army equivalent could exist. It was contended that there was no inconsistency between the new pay and allowances and the sea ration, and that therefore the act granting the ration could not be considered as repealed.

This court, following the Court of Claims, disregarded the argument derived from the appropriateness of the allowance and the hardship of taking it away, and held that Congress meant to substitute the entire system of army pay and allowances for the system of navy pay and allowance. It was held that no ration can be allowed to an officer of the Navy while at sea for the reason that no such allowance is made to an officer of the Army.

The situation is here reversed. The naval officer claims while at sea the exact pay which an officer of the Army would receive in like official circumstances. He is met by the same argument which has been already overruled when set up in his favor in claiming the ration.

It is now argued for the United States that the naval officer can not receive the ten per cent increase because that increase is peculiarly applicable to duty performed on land by an officer of the Army. Thus he has lost the allowance made to him by the old law for being on ship-board separated from his family and at an increased expense of living; while at the same time the Government contends that he can not receive the increase of ten per cent, the only statutory condition of which is "serving beyond the limits of the States comprising the Union" and the contiguous Territories.

If the words "same pay and allowances" are of sufficient force to deprive the naval officer of his sea ration because it is not received by an officer of corresponding rank in the Army, the same words are sufficient to give him the increase of pay which an officer of corresponding rank in the Army serving in the same places in like official circumstances is entitled to receive.

The Case Mathematically Stated.

In taking the pay of an army officer serving within the United States as the standard or one hundred per cent, we may thus compare army and navy pay:

I. Officers on duty within the States of the Union and contiguous Territories:

Army pay	100 per cent
Navy pay	100 " "
except (act of March 3, 1899, § 13, first proviso) *when on shore* . .	85 " "

II. Officers on duty beyond the States of the Union and contiguous Territories:

Army pay	110 " "
Navy pay	110 " "
except (as contended in this case) *when at sea*	100 " "

The exception under the first class is made by direct statutory command; for the proposed exception under the second class, no statutory authority can be cited. This is the more striking since it is opposed to the long-established statutory system of paying more for sea than for shore duty. (*Rodgers* v. *United States*, 185 U. S. 83, 92.)

It is this exception which we are now asking the court to declare unauthorized by law.

An Executive Amendment.

To support the construction given to the act of March 2, 1901, by executive authority, it has been found necessary to introduce new words into the text of the statute as officially published. In the annual Navy Register and other official publications of the Navy Department the act reads as follows:

. "That hereafter the pay proper of all officers and enlisted men serving (on shore) beyond the limits of the States comprising the Union and the territories of the United States contiguous thereto, shall be increased ten per centum for officers," etc. [continuing as in the proper text of the statute, *ante*, p. 9]. (Circular No. 8, Bureau of Supplies and Accounts, September 15, 1902, p. 96; Navy Register, January 1, 1904, p. 209, Note 2[a].)

The words "(on shore)" are not in the text of the act as enacted by Congress. They are officially introduced.

A construction of a statute which requires the insertion of words in the text in order to make the text conform to the construction is legislation, not interpretation.

Summary.

We regret the length of this argument. The discussion has been prolonged only because the defense consists in an attempt to evade the plain meaning of the statutes involved.

As the act of 1899 grants to naval officers the pay of army officers, they are entitled to receive the increased pay allowed to army officers by the acts of 1900 and 1901, when they are serving in the localities named in these acts as those in which service of army officers entitles them to the increase.

PART II.

Mode of Calculating Increase.

The right of the claimant to an increase of ten per cent being assumed as established, the next question is how that increase is to be calculated. The solution of this question depends upon the construction placed upon the term "pay proper" as used in the acts of May 26, 1900, and March 2, 1901.

Statutes.

The claimant is a captain of more than fifteen years' service in the Navy. He corresponds in rank to a colonel of similar length of service in the Army (Revised Statutes, § 1466).

The following are the material provisions of the Revised Statutes in regard to the pay of such an officer:

"Section 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations; * * * Colonel: $3,500 a year. * * *

"Section 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

[Amended by Act of June 30, 1882 (22 Stat. L. 118), to provide that the increase "shall be computed on the yearly pay of the grade."]

"Section 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

"Section 1267. In no case shall the pay of a colonel exceed $4,500 a year, or the pay of a lieutenant-colonel exceed $4,000 a year."

The claimant therefore receives the maximum pay permitted by Section 1267 to be received by a colonel in the Army, $4,500. That sum is composed of the yearly pay of the grade fixed by Section 1261, $3,500, and longevity increases granted by Section 1262, as amended by the act of 1882, and as limited by Sections 1263 and 1267, $1,000.

Is the ten per cent increase of "pay proper" to be computed on the yearly pay of the grade or on the entire pay including longevity increases?

The Court of Claims decides that the entire pay, including longevity increases, constitutes "pay proper," and should therefore be taken as the basis for computation of

the ten per cent increase allowed by the acts of 1900 and 1901. (Record, p. 24, last complete paragraph on page.) The appeal of the United States questions the correctness of this conclusion.

Opinion of Court of Claims.

The opinion of the Court of Claims in this case (p. 24) refers to that rendered by the court in *Irwin* v. *United States* (38 C. Cls. 87). The material portion of that opinion is as follows (38 C. Cls. 101–103):

"But the question is whether the increase shall be calculated upon the minimum pay of the grade or upon the total pay, including longevity increase. In other words, shall the increase be computed upon $2,500, constituting the lowest pay of a lieutenant-commander, or upon $3,500, constituting the total pay which carries the amount of the longevity increase?

"The proper determination of the question depends upon the true meaning of the words 'pay proper' as they appear in the statute.

"It is insisted by the defendants that in using the words 'pay proper' the minimum pay of the grade is the true basis of calculation. That is the construction of the accounting officers (4 Comp. Dec. 668, and 6 Comp. Dec. 944).

"The want of any statutory definition or direct judicial determination involves the matter in doubt as to whether 'pay' and 'pay proper' are equivalent, and whether the word 'proper' refers to any special kind of pay or only means that compensation which is properly called 'pay.'

"Military lexicons disclose differences between pay and allowances to officers. These differences nowhere appear more clearly stated than in *Sherburne's case* (16 C. Cls. R. 491), in which, quoting from Scott's Military Dictionary, it is shown that—

"'Pay is a fixed and direct amount given by law to persons in the military service in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly

termed, are indirect or contingent remuneration which may or may not be earned, and which is sometimes in the nature of compensation and sometimes in the nature of reimbursement.'

"In *Tyler* v. *United States* (16 C. Cls. R. 223) the method of computing longevity pay prescribed by Section 1262 of the Revised Statutes was declared to be not by taking one-tenth of the officer's fixed annual pay, but one-tenth of his current yearly pay; that is, his second longevity pay to include 10 per cent of his first longevity pay, subject to another provision limiting the total amount of such increase to 40 per cent of the fixed annual pay. In affirming this judgment, Mr. Justice Miller, for the Supreme Court, said that—

"'The words "current yearly pay" require that when the increased pay for any period of five years is to commence the 10 per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank and any additions of 10 per cent previously earned for periods of five years constitute the current yearly pay on which said 10 per cent is to be calculated.' (105 U. S. 244, 246.)

"In *Emory* v. *United States* (19 C. Cls. R. 255) it was held that the 'three months' extra pay' given to those who served in the war with Mexico, by the acts of 1848 and 1879, is pay proper, not pay and allowances. This opinion treats 'pay' and 'pay proper' as interchangeable terms.

"An officer's pay implies a pay subject to change. When the longevity increase attaches it is as much of the officer's proper pay as the amount first fixed.

"Pay proper is pay regulated by service. It depends upon the officer's longevity. Longevity arises out of length of service and is founded on that. The pay proper in such a case is determinable upon an officer's lustrum—the amount he is to receive for every five years' period of service.

"Longevity pay provisions are a legislative convenience. They go hand in hand with the officer's pay as the years add to his term of service. These provisions say in effect that a major shall receive, during the first

five years of service, $2,500; during the second, $2,750, etc. Thus longevity pay is as fixed and certain as if actual amounts had been named.

"From these views we think that the computation made upon the minimum pay of the grade is erroneous."

Executive and Legislative Precedents.

The Court of Claims refers in the course of the above opinion to a decision of the accounting officers (4 Comp. Dec. 668) adverse to this definition of pay proper. The departmental and legislative precedents cited in that decision are all in favor of the definition upheld by the Court of Claims. We quote therefrom as follows (4 Comp. Dec. 670, 671):

"The term 'pay proper' seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between 'pay' and 'allowances.' On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting thirty-five years' half-pay, used the following language:

"'The term "half pay" is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"'A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half-pay proper.'

"In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat. 248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments;

and, in order to more clearly define the distinction, the words 'pay proper' were used in the decisions construing said act. The words 'pay proper' were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat. 497), which granted an addition of three months *pay proper* to certain officers of the volunteer army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat. 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the Army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of 'pay proper.' (Dec. Second Comptroller, Vol. 45, p. 129.) These cases are the only ones I have been able to find where the words 'pay proper' have been construed as including or excluding increased pay."

Dictionary Definitions.

The use of the term "pay proper" as meaning whatever is in a proper sense pay is in strict accord with the definition of the word "proper" found in the dictionaries, as follows:

Webster's Dictionary:

"*Proper:* 6. Rightly so called; strictly considered; as Greece proper; the garden proper."

Century Dictionary:

"*Proper*—5. Rightly so called, named or described; taken in a strict sense, usually following the noun, as the apes proper belong to the Old World. No shell fish are fishes proper.

"'This elevation descended into what might be called the garden proper.' Scott, Waverly, IX.

"'It is safe to assert that no government proper ever had a provision in its organic law for its own termination.' Lincoln in Raymond, p. 614."

Standard Dictionary:

"*Proper*—*A.* Conceived according to the strict definition or application of the term; understood in the most approved or correct sense; commonly following the noun modified.

"'A mere physical affection of the organism does not constitute a sensation proper.' Spencer Psychology, vol. ii, § 353, p. 246."

We find that the word "proper" is merely intensive to the noun qualified; that the term "pay proper" has been used by the departments and the courts to distinguish pay from emoluments or allowances, and that this court has decided that the longevity increase is a part of the "current yearly pay."

Longevity increase is nowhere treated by military authorities as an emolument or allowance, but always as a part of the pay. (Scott's Military Dictionary, words "Pay" and "Allowances"; 10 Opinions of Attorneys-General, 284; Digest of Opinions of Judge Advocate-General of the Army, Revised Edition, 1901, Paragraphs 1894, 1969.) Not being an allowance, it is a part of the pay itself, or of the "pay proper." The decision of the court below on this point should therefore be affirmed.

PART III.

Full Pay in Transit and Receiving Orders.

The Court of Claims finds the facts upon this branch of the case as follows (Findings II, III, Record, p. 6, the order being slightly transposed to make a consecutive narrative):

"Claimant was relieved as commanding officer of the *Lancaster* December 2, 1899, and ordered to report to the Navy Department.

"When relieved as commanding officer of the *Lancaster*, the vessel was at Barbados, West Indies. The claimant

took the merchant steamer *Wordsworth* from Barbadoes to New York. He reported at the Navy Department December 12, 1899. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer sailing from San Francisco, January 6, 1900. He reported in obedience to said orders and was assigned to the command of the U. S. S. *Baltimore* February 7, 1900. April 16, 1900, he was detached from the *Baltimore* and ordered to command the U. S. S. *Brooklyn*, April 17. On March 26, 1901, he was ordered detached from the command of the *Brooklyn* on reporting of his relief and ordered to the command of the U. S. S. *Oregon*. He was detached from the former vessel April 4. On April 5 and 6, 1901, he was traveling from Cavite to Hongkong on the merchant steamer *Esmeralda*, and reported on the latter vessel April 7, of which he remained in command until *July* 6, 1901."

The Personnel Act, Section 13, first proviso, *ante*, page 4, provides: "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty." This reduction of fifteen per cent was enforced against the claimant between December 2, 1899, when relieved as commanding officer of the U. S. S. *Lancaster*, and February 7, 1900, when he took command of the U. S. S. *Baltimore*, at Hongkong; also on the 5th and 6th days of April, 1901, when traveling on a merchant steamer from Cavite to Hongkong in changing command from the *Brooklyn* to the *Oregon*.

Was this deduction warranted, or is he entitled to full pay during all or any part of the time named?

The Court of Claims decided in the original opinion (Paragraph 2, p. 12) against the claimant on this point. Mr. Chief Justice Nott delivered a dissenting opinion relating entirely to this question (pp. 18–21). To the opinion by Judge Peelle on the rehearing, the adverse ruling on this item of claim is adhered to (end of opinion,

p. 25). This item forms the sole subject of the assignment of error by the claimant on his cross appeal.

The Question Involved.

The opening clause of the Personnel Act of 1899, *ante*, page 8, grants in general terms the pay of army officers to the line officers of the Navy. The first proviso provides: "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty"; while the second proviso restores full pay to officers "detailed for shore duty beyond seas." The question, therefore, is whether the claimant in this case was during the periods under discussion "on shore"; and if on shore whether he was during any part of the time on "shore duty beyond seas."

The periods involved may be thus classified:

1. While traveling from Barbados to New York on a merchant steamer.
2. While traveling by land from New York to Washington and from Washington to San Francisco.
3. While reporting and receiving orders at the Navy Department.
4. While traveling by merchant steamer from San Francisco to Hongkong.
5. While traveling by merchant steamer from Cavite to Hongkong.

Traveling by Sea.

During three of these five periods, the claimant was literally not "on shore." He was at sea, traveling under orders on merchant vessels: December 2 to 11, 1899, from Barbados to New York; January 6 to February 7, 1900, from San Francisco to Hongkong, and April 5 and 6, 1901, from Cavite to Hongkong.

The Rule as to Provisos.

As the act of 1899 by its opening clause establishes a rate of pay for officers in the Navy, and then by a proviso carves out an exception to this rate, the general rule laid down by Mr. Justice Story in *United States* v. *Dickson* (15 Peters, 141, 165) for the construction of provisos should apply:

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof. Applying this rule to the circumstances of the present case, how does it stand? The enacting clause gives to each receiver a commission of one per cent upon all the public moneys received by him. This was precisely in conformity to the antecedent laws. The proviso limits that percentage to an amount not exceeding $2,500 for any one year.

"Until, then, the percentage of the particular receiver has reached that amount, in whatever period of the year it may arrive, the proviso, according to its very terms, has no operation; and when that maximum is reached, the percentage ceases, whether any more public moneys are received by that officer or not. The case, then, of the present receiver falls directly within the enacting clause. He seeks only the maximum commission upon the moneys actually received by him during his continuance in office; and the proviso either does not touch his case, or it only operates to cut off all subsequent commissions from him, for other moneys received during his continuance in office. The proviso contains no limitations of his percentage, by connecting it with, or making it dependent upon the commissions, or the receipt of public

moneys by his successor in office. The proviso is, that he shall receive no more for any one year; not that any other receiver may not receive a like compensation accruing from his subsequent appointment and receipts in office, for the portion of any year which is then unexpired."

Applying this rule to that portion of the time during which the claimant was on a merchant vessel at sea, he clearly can not be taken by the proviso out of the general operation of the enacting clause; for he was not in any sense of the term "on shore."

Statutory Definition of Sea Service, etc.

But it is insisted on behalf of the United States that the service in question was none of it "sea service" within the definition of Section 1571 of the Revised Statutes:

"Section 1571. No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law."

In response to this it may first be remarked that an examination of this provision in the act of June 1, 1860 (§ 3, 12 Stat. L. 27), from which the provision of the Revised Statutes is taken, indicates its primary purpose to have been rather that of fixing the amount of credit for sea service than of fixing the pay while on such service. Pay was by that act graded according to the length not merely of service but of sea service. A lieutenant, for instance, had different rates of pay (p. 24) "after he shall have seen seven years' sea service in the Navy," and nine, eleven and thirteen years' sea service, respectively.

The same act of 1860 created different rates of pay for officers "on duty at sea," "on other duty" and "on leave or waiting orders."

The act of July 15, 1870 (16 Stat. L. 321), by its third section (pp. 330–332) enacted a new pay table, fixing different rates of pay "when at sea," "on shore duty," and "on leave or waiting orders," respectively. This pay table of the act of 1870 was carried into Section 1556 of the Revised Statutes. The definition of "sea service" made by the act of 1860 was not carried into the act of 1870. It was however regarded by the revisers as in force, and carried into the Revised Statutes as section 1571.

Even after 1870, however, and down to the passage of the Personnel Act, the terms ordinarily used in the Navy were still "sea pay" and "other duty pay" as contained in the act of 1860. (See Navy Regulations, 1896, Articles 1155, 1158, 1159.) In view of the provisions of Section 1571, defining sea service, this no doubt was a proper distinction.

Definition no Longer in Force.

The act of 1899 established a new system. Instead of fixing different rates of pay for different classes of duty and defining the classes, it fixes a general rate of pay without definition of the conditions, but leaving them to be gathered from the acts defining the pay of the Army. This general rule is followed by a special exception of officers "when on shore," reducing their pay by fifteen per cent. This again is followed by an exception to the exception, restoring the full pay of an army officer to officers on shore duty when that shore duty is performed beyond seas.

Thus there are only two rates of pay; one of them, the general or normal rate, being that fixed by the army statutes; the other, the rate "when on shore" if not "beyond seas."

For "leave or waiting orders" pay, reference must now

be had to the Army Statute (Revised Statutes, § 1265), which gives "full pay" to officers "waiting orders."

In *Gibson* v. *United States* (194 U. S. 182, 192) this court held that this act was intended as a complete substitute for the previous pay statute.

This rule is just as applicable to the definition of sea service contained in Section 1571 of the Revised Statutes as it is to the allowance of sea ration granted by Sections 1578 and 1585 which was then specially under consideration.

Sea service is no longer a condition of receiving full pay. Section 1571 therefore has no application. Hence the claimant, while traveling on duty on a merchant steamer at sea was entitled to full army pay because not "on shore" within the meaning of the Personnel Act, or indeed in any sense of the term.

If Shore Duty, it is Beyond Seas.

His right to full pay on merchant steamers is, however, not affected even if Section 1571 remains in force. If the claimant was not during the time of so traveling engaged in "sea service," he was necessarily "on shore." As he was traveling on duty under orders, he was on "shore duty." While at sea outside the Territories of the United States, he was "beyond seas." That term is defined by the Court of Claims in *Irwin* v. *United States* (38 C. Cls. 87) where many authorities are cited (pp. 95–100).

The second proviso of Section 13 of the Personnel Act, *ante*, top page 9, declares that naval officers "detailed for shore duty beyond seas" shall receive the full pay of army officers. The service can not be treated as shore service for the purpose of taking away a part of the pay under the first proviso, and as not shore service for the purpose of restoring it under the second.

Summary.

The status of the claimant on his three voyages on merchant steamers was therefore as follows:

1. He was not "on shore," and consequently not within the exception to full army pay.

2. But if he was "on shore," then he was on "shore duty beyond seas," and therefore entitled to full pay as provided by the second proviso to Section 13 of the Personnel Act.

For the two days constituting the last voyage involved, April 5 and 6, 1901, he is, if entitled to full pay, also entitled to have the ten per cent increase under the act of March 2, 1901, calculated on his full pay instead of merely on shore pay. (Conclusion of Law, Paragraph 2, Record, p. 10.)

Land Travel—Reporting at Navy Department.

What is the proper rate of pay of the claimant while traveling across the continent between December 12, 1899, and January 6, 1900, en route from one sea duty to another, and during this time reporting under orders at the Navy Department?

The Court of Claims holds that during this time the officer was properly subjected to a reduction of fifteen per cent. It is submitted on the contrary, that to bring an officer within the proviso requiring a reduction of fifteen per cent "when on shore" there must be a definite assignment to shore duty. Such assignments are provided for by the act of March 3, 1883 (22 Stat. L. 472):

"Section 2. That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state

in the order of employment, and also the duration of such service, beyond which time it shall not continue." (Modified by act of July 11, 1892 (27 Stat. L. 245), so as to provide that the orders "need not state the duration of such service.")

The words of the first proviso, "when on shore," in connection with those of the second proviso, "detailed for shore duty beyond seas," must be read in the light of the act just quoted.

The reduction of fifteen per cent was intended by Congress to take effect only upon an assignment to shore duty as contemplated by these acts. For all other service the officer remains entitled to the full army pay of the corresponding grade. It would be unreasonable to subject an officer to the loss of a part of his pay for a few days of transit from one sea duty to another sea duty, during which the officer was in part traveling and in part reporting at the Navy Department, presumably for the purpose of receiving instructions in regard to his sea duty. No public interest can be subserved and no intelligent purpose ascribed to Congress in the legislation by construing it as requiring a deduction of pay during brief intervals like these, amounting in some instances to as little as one or two days.

The dissenting opinion of the Chief Justice of the Court of Claims discusses this whole question so fully and ably as to relieve us from further extending this argument.

Other Decisions of the Court of Claims.

The Court of Claims has rendered two decisions, apparently inconsistent with that in this case.

In *Collins* v. *United States* (37 C. Cls. 222) the claimant was wounded while at sea and sent temporarily to hospital without being detached. The Navy Regulations for 1896, Paragraph 1154, provide: "An officer temporarily

absent from a ship in commission to which he is attached, shall continue to receive sea pay." It was held that the temporary absence of the officer from his vessel in hospital by authority did not deprive him of his right to sea pay.

In *Engard* v. *United States* (38 C. Cls. 712) the claimant while on sea duty was ordered to inland points for temporary duty in connection with the inspection of steel tubes for boilers of a vessel other than his own. It was specified "this duty is in addition to your present duty." On this duty he performed two journeys, and was absent in all 122 days from his vessel. It was held that he should not be deprived of his sea pay while temporarily ashore on this duty.

The principle underlying these decisions is that an officer's sea pay can not be reduced by temporary assignments to duty on shore not interfering with his general sea status.

The decisions are the more striking from the fact that both cases arose at a time prior to the passage of the Personnel Act, and therefore while Section 1571 of the Revised Statutes defining sea service was unquestionably in full force.

CONCLUSION.

It is therefore submitted that the judgment of the Court of Claims should be affirmed upon the following points:

1. That the claimant is entitled to ten per cent increase of pay while serving "in the Philippine Islands" and "in China" from May 26, 1900, to March 2, 1901, and "beyond the States comprising the Union and the Territories of the United States contiguous thereto" from March 2, 1901, to June 12, 1901.

2. That this increase should be calculated upon his entire pay, including longevity pay, and not merely upon the grade pay.

It is submitted that the judgment of the Court of Claims should be reversed on the following points, and that it should be held:—

3. That while the claimant was temporarily passing from one sea duty to another his full army pay continues; and—

4. That while traveling on merchant steamers he was not subject to a reduction of fifteen per cent as "on shore"; because he was either at sea or, if on shore, was "detailed for shore duty beyond seas," and in either event is entitled to the full army pay.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Charles M. Thomas,
Appellee in No. 94; Appellant in No. 95.